

STATE OF VERMONT

SUPERIOR COURT  
Chittenden Unit

CIVIL DIVISION  
Docket No. 333-4-15 Cnev

BRIANNE E. CHASE, TRUSTEE OF THE  
REVOCABLE LIVING TRUST OF  
BARBARA S. EASTMAN,  
Plaintiff,

v.

TOWN OF UNDERHILL, et al.  
Defendants.

VERMONT SUPERIOR COURT

NOV 14 2016

Chittenden Unit

RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST  
DEFENDANTS STANLEY SENGER, SUSAN SENGER, CARL MENARD, AND CAROL  
MENARD, MOTION FOR DEFAULT JUDGMENT AGAINST DEFENDANT DAVID  
ARNOLD, AND RENEWED MOTION FOR SUMMARY JUDGMENT AGAINST  
DEFENDANT TOWN OF UNDERHILL ON COUNT II

This is an action concerning a landowner's right of way on a town trail. The Court previously denied the Trust's motion for summary judgment and ordered joinder of Defendants David Arnold, Stanley and Susan Senger, and Carl and Carol Menard. The Trust now moves for default judgment against David Arnold and summary judgment against the Sengers and Menards. The Trust also renews its motion for summary judgment against Underhill on Count II. In that count, the Trust requests declaratory judgment that it has a common law right of way over the portion of Repa Road that is now designated as a trail.

Facts

The following facts are undisputed unless noted otherwise. The Trust owns a parcel of land ("Eastman Parcel") in Westford, Vermont, that is adjacent to and bounded on the East by the Underhill-Westford town line. Prior to 1972, the Eastman Parcel could be accessed by Goodrich Road from the West or Repa Road from the East.

In 1972, the Town of Westford stopped maintaining several portions of Goodrich Road, which it either discontinued or reclassified as trails. In 1996, Underhill attempted to discontinue a portion of Repa Road to the boundary of the Town of Westford, which is also the boundary of the Eastman Parcel. Neither attempt at discontinuance complied with 19 V.S.A. § 790. In 2000, the Selectboards of Westford and Underhill met regarding the discontinuance of Goodrich Road and a portion of Repa Road. The Town of Westford reclassified Goodrich Road as a trail, and Underhill reclassified 238 feet of Repa Road, from the Westford/Underhill town line (which is

also the eastern boundary of the Eastman Parcel) to the Arnold driveway, as a trail with a width of three rods. The Repa Trail abuts the Eastman Parcel.

In 2001, the A. Johnson Company, Joseph Bornstein, Underhill, and Westford settled litigation that arose from the redesignation of Repa Road and Goodrich Road. Pursuant to the settlement agreement, the A. Johnson Company and Bornstein have the right to use the trails by motor vehicles for forestry management.

Underhill does not contest that the Trust has a right-of-way over the Repa Trail to the Eastman Parcel; it simply disputes the scope of the right-of-way. The Court previously denied the Trusts motion for summary judgment on its claim that it has a common law right of way that would allow it to use the Repa Trail for vehicular access to a single residence on the Eastman Parcel. The Court ruled that the Trust's evidence does not sufficiently support the scope of its request to use the trail for access by motor vehicles to serve a residence. See *Thompson v. Ryan*, No. 2006-286, 2007 WL 5313344, at \*2 (Vt. Feb. 2007) (unpublished mem.) (affirming restriction of the scope of landowner's right of access based upon his "individual and historic use of the right of way"):

The court cannot conclude that Repa Road historically served a residence on the Eastman Parcel based on the settlement agreement between Underhill, A. Johnson, and Bornstein. The evidence of stone ruins that may or may not have been a working farmstead does not prove the manner in which Repa Road was used. Even if the Trust's right of access includes the use of motor vehicles for logging purposes, the court cannot conclude based on the undisputed material facts that the frequent use of the trail with motor vehicles for access to a residence is the same as, or included within, the periodic use of motor vehicles for logging.

*Chase v. Town of Underhill*, No. 333-4-15 Cncv (March 25, 2016) (Toor, J.).

The Trust's renewed motion for summary judgment is based solely on additional evidence that it proffers in the form of an affidavit from Robert Nolan, who purports to have grown up in a home on the Eastman Parcel from 1945 until 1961. Affidavit of Robert Nolan, ¶ 1. Nolan asserts that "the only vehicular access to [the] home was over Repa Road in Underhill," and that the Town of Underhill "did work on the road" and "kept it plowed." *Id.*, ¶ 3. Nolan also asserts that he walked along Repa Road to get to school. *Id.*, ¶ 4.

Underhill refers to the deed, which shows that the Nolans purchased the land in 1957. See Exh. 1 (attached to complaint). According to Underhill, the discrepancy between the date in the deed and the dates in Nolan's affidavit suggests that the time the Nolans occupied the property may have been different than the period indicated by Nolan in his affidavit.

The Town proffers an affidavit of David Arnold, who purportedly owns property in Underhill adjoining the Eastman Parcel. Arnold asserts that the entire length of the Repa Trail is on his property. Affidavit of David Arnold, ¶ 2. Arnold also purports to have spent as much as

60% of the year at his property in the 1960s. *Id.*, ¶ 4. Although his use diminished over time, he says that he “spent substantial amounts of time” on his property as well as the trails on the Eastman Parcel from the 1960s through the 1990s. *Id.*, ¶ 5. Arnold claims to have never seen any member of the Eastman family use the Repa Trail except to access their property by foot, and that the Nolan residence was already abandoned at the time he purchased his property in 1964. *Id.*, ¶¶ 5, 9. Arnold also claims to have seen the Eastmans park near his driveway where Repa Road ends, and then access their property by foot. *Id.*, ¶ 5.

### Discussion

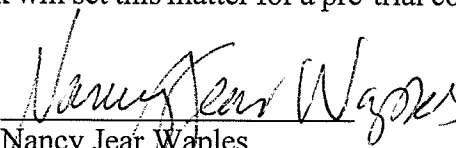
The first question is whether the Trust is entitled to summary judgment based on new facts in the Nolan affidavit. The Trust argues that Nolan’s assertions show the historic use of Repa Trail for vehicular access to a residence. However, the Arnold affidavit places the facts based on Nolan’s memory in dispute. Even if the Nolan affidavit established that the Repa Trail was used for several years of vehicular access to a residence on the Eastman Parcel, the Court is not persuaded that this fact alone establishes a sufficient individual and historic use of the right of way to justify the scope of use that the Trust requests. See *Thompson v. Ryan*, No. 2006-286, 2007 WL 5313344, at \*2 (Vt. Feb. 2007) (unpublished mem.). How many vehicles typically travelled along the trail, how often, and for how many years? Was the vehicular use discontinued, and if so, for how long? The facts are simply not yet sufficiently established to justify judgment as a matter of law for the Trust.<sup>1</sup>

The second question is whether the Trust is entitled to default judgment against Arnold. When a defendant has not appeared, and the claim is not for a sum certain, “the court may conduct such hearings or order such references as it deems necessary and proper.” V.R.C.P. 55(b)(3). Although Arnold provided an affidavit for Underhill, he did not file a proper answer. However, the court prefers to resolve disputes on their merits. See *Desjarlais v. Gilman*, 143 Vt. 154, 158–59 (1983) (“Generally, the rules relating to default judgments should be liberally construed in favor of defendants, and of the desirability of resolving litigation on the merits, to the end that fairness and justice are served.”). The court reserves its decision regarding Arnold’s default until it can decide the merits of the Trust’s claims based on a fully developed factual record. *Ayer v. Hemingway*, 2013 VT 37, ¶ 21, 193 Vt. 610 (holding that judgment by default is at the trial court’s discretion).

### ORDER

The Trust’s motions for summary judgment are *denied*. The Trust’s motion for default judgment against David Arnold is *reserved*. The clerk will set this matter for a pre-trial conference.

Dated this 14<sup>th</sup> day of November, 2016.

  
Nancy Jear Waples,  
Superior Court Judge

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<sup>1</sup> Notably, although Nolan asserts that the only vehicular access to the Nolan residence was over Repa Road, he does not make any statements that expressly show that the portion of the road that is now Repa Trail was ever actually used for motor vehicles.